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IN THE

Supreme Court of the United States

October Term, 1962.

No. 820.

ABRAHAM MINKER, also known as Abe Minker,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PETITIONER'S REPLY MEMORANDUM.

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Because of the nature of the government's Brief in Opposition to the application for a writ of certiorari, the petitioner believes that a short reply is necessary.

1. The trash receptacle, the entire contents of which were systematically taken by the government agents, was kept in a usual and customary place for such a household facility. As a household facility, the receptacle was as to both location and usage an integral part of petitioner's household. No case hitherto has circumscribed the constitutional protection so as to exclude the physical area here involved. Moreover, it is submitted that living in an apartment, and therefore being required to share certain necessary facilities, does not include a loss of standing to claim constitutionally guaranteed rights.

It is emphasized that just days prior to the commencement of the seizures here involved, raids upon a number of

places where evidence of a gambling operation was found produced nothing to implicate the petitioner in any way. A simultaneous raid upon his apartment produced nothing to implicate him in a gambling operation or to connect him with the other defendants referred to by the government. At the trial, the only defendant who was supposed to constitute the link between the petitioner and the operation was acquitted by direction of the district court. *The search in this instance was for incriminating evidence.* Greater vigilance for the protection of constitutional rights is indicated, and greatest restraint upon the government's intrusion is demanded. *Abel v. United States,* 362 U. S. 217, 237; *cf. Frank v. Maryland,* 359 U. S. 360 (1959). In the attempt to obtain such evidence the government agents merely arranged for another to do what they themselves were not authorized to do: enter upon the premises, within the curtilage, and seize generally all of the contents of the trash receptacle. Certainly there was no abandonment within the circumstances so carefully circumscribed by this Court in *Abel v. United States, supra.* To hold otherwise would permit government agents to accomplish their objective by using employees such as chambermaids, bellhops, janitorial personnel and the like to remove the contents of trash baskets which have been placed in containers or incinerators outside one's apartment but within the "curtilage" for delivery to government agents.

2. It must be emphasized that in this case the indictment charged willful attempt to evade by means of the failure to file returns, to pay the excise taxes and concealment of information. Plainly the willfulness alleged as to the attempt to evade applies to the means by which the evasion was effected. It must follow, therefore, that the elements of the lesser offense must be proved in order to prove the greater offense. In classic terms, the lesser offense is necessarily included in the indictment, and this is borne out in

the proofs and argument of the government in the district court in this case.

The case of *Chaifetz v. United States*, 181 F. Supp. 57, aff'd, 288 F. 2d 133 (D. C. Cir. 1960), rev'd in part on suggestion of error 366 U. S. 209, is not adequately represented to this Court by the government in its Brief in Opposition (p. 7). Examination of the proceedings in that case discloses that the indictment charged evasion by the *filing of false returns*. Clearly, then, the case is inapposite. It is submitted that the decision below, in refusing in the circumstances of this case to render a charge, as requested, on lesser included offenses, is at variance with settled law and Rule 31(c) of the Federal Rules of Criminal Procedure.

Rule 31(c) comprehends that a lesser offense is "necessarily included" if it is fairly charged by the indictment. A lesser offense is fairly charged if it is included in the acts alleged in the indictment as constituting the greater offense, as it most certainly was here, whether or not the greater may be committed without perpetrating the lesser. Rule 31(c) was a restatement of existing law, 18 U. S. C., former § 565, which provided that "the defendant may be found guilty of any offense the commission of which is *necessarily included in that with which he is charged in the indictment.*" There is no suggestion of a limitation such as urged by the government. Although the theory of the necessary included offense may postulate a gradation in which the greater offense contains some aggravating incident not found in the lesser (which is the case here), an accepted corollary is that where the indictment not only charges the major offense but also in terms the lesser offense, the accused may be convicted of the lesser offense even though not forming a constituent part of the major offense charged. 42 C. J. S. § 271, p. 1295.

3. Contrary to the statement in the government's Brief in Opposition (pp. 8-9), nothing in the evidence supports the inference that the euphemistically termed "documents"

were prepared for or kept by the petitioner. Nothing supports the inference that he had ultimate dominion over the small group of adding machine tapes. Nothing shows that he had received them "daily". And while all of the tapes carried handwriting, *none of it was claimed to be the petitioner's except as to some figures on one or two pieces which had been torn off the tapes* (and there was no evidence as to when the figures were placed on those pieces). Since there was absolutely no evidence whatsoever to afford an inkling of any connection between the petitioner and a numbers lottery other than the pieces of paper found in the trash, it is pure speculation to conclude that he was the owner merely from the discovery of the pieces of paper in a trash receptacle used by his household, as well as others.

4. With respect to the sentence, it is the position of the petitioner that the effect of the holding below is to afford the executive department a multiple choice of varying penalties for an identical offense. The applicable statute, 26 U. S. C. § 7201 punishes the willful attempt to evade taxes. The evidence in this case did not establish *multiple* attempts.

The government in its Brief in Opposition (p. 9) does not adequately present to this Court the effect of *United States v. Shaffer*, 291 F. 2d 689 (7th Cir. 1961). Contrary to the government's statement, in that case Count I charged a conspiracy to willfully attempt to evade for the months of September through November, 1957; Count II charged willful attempt to evade in the month of September, 1957; Counts III and IV charged willful attempts to evade in November and December, 1957, respectively; and Count V charged willful failure to register. The district court, however, imposed *concurrent sentences of imprisonment* on the first four counts and a consecutive sentence on Count V; and fines on Counts I, II, and V. The problem raised in this case was not raised in the *Shaffer* case. On the other

hand, *Bohn v. United States*, 260 F. 2d 773 (8th Cir. 1959), wherein the indictment charged willful evasion over a period of a year despite the fact that returns were required to be filed monthly, demonstrates that the executive branch of the government does reserve to itself the choice of multiple penalties.

Finally, *United States v. Guterma*, 281 F. 2d 742, 752 (2d Cir. 1960), is inapposite because the separate sentences were imposed under an indictment charging separate substantive offenses of failure to file required reports. The substantive offense charged here was willful attempt to evade. For like reasons *Swepston v. United States*, 289 F. 2d 166, 168-169 (8th Cir. 1961), and *United States v. Alaimo*, 297 F. 2d 604, 605-606 (3d Cir. 1961), cited in the government's Brief in Opposition (p. 19), are inapplicable.

5. Petitioner submits that the issues raised here are of singular importance in the effectuation of constitutional guarantees and in the administration of criminal laws and procedures in the federal courts, and that the decision below is at variance with settled policies and the decisions of this Court and those in other Circuits. Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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